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Supreme Court, U. S.
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In the Supreme Court
of the United States

No. .....

OCTOBER TERM, 1971

WILKES WIRTH,

Respondent,

v.

CLARK EQUIPMENT COMPANY,
a corporation,

Petitioner,

and

MATSON NAVIGATION COMPANY,
a corporation,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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2. Did the United States Court of Appeals for the Ninth Circuit erroneously forecast the Oregon law of strict liability when it decided that an open, obvious, patent and known condition could constitute a "defect" under Restatement § 402A? 3

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Clark Equipment Company, a corporation, prays that a writ of certiorari issue out of this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 457 F.2d 1262 (9th Cir. 1972); the full text of the opinion appears in Appendix A (A. 29-40).[1] The full text of the order on petition for rehearing, not being officially or unofficially reported, appears in Appendix B (A. 41).

The United States District Court for the District of Oregon entered a judgment based upon a jury verdict rendered in favor of petitioner, Clark Equipment Company. This judgment has not been reported, officially or unofficially, and appears verbatim in Appendix C (A. 42).

JURISDICTION

The judgment sought to be reviewed is dated and was entered of record on March 16, 1972, and the order of the United States Court of Appeals for the Ninth Circuit denying petitioner's petition for rehearing is dated and was entered of record on April 18, 1972.

The statutory provisions believed by the petitioner

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[1] References in this petition are as follows: "A" refers to Appendix hereto; "Tr." refers to the transcript of testimony; "R" refers to the record certified and transmitted from the United States District Court for the District of Oregon to the United States Court of Appeals for the Ninth Circuit. Petitioner has requested the Clerk below to certify and transmit to this Court the entire record, including transcript, court files with index thereto, and original exhibits.

to confer jurisdiction upon this Court to review the judgment in question are: 28 U.S.C. § 1254 and 28 U.S.C. § 2101(c).[2]

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Ninth Circuit prejudicially err in violating the abstention doctrine when it reversed defendant's judgment below and premised its decision upon a forecast of an important (and heretofore undecided) policy issue of Oregon's substantive law, when that identical issue was pending before the Oregon Supreme Court?

2. Did the United States Court of Appeals for the Ninth Circuit erroneously forecast the Oregon law of strict liability when it decided that an open, obvious, patent and known condition could constitute a "defect" under Restatement § 402A?[3]

3. Where the cause was submitted by the District Court to the jury on a negligence theory, and a strict liability count was withdrawn from the jury's consideration because the condition was open and obvious, and defendant received a jury verdict, did the jury, by deciding that the conditions did not constitute negligence, necessarily decide *sub silentio* that any defective condition" was not "unreasonably dangerous"?

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[2] These statutes, in relevant part, are reprinted in Appendix D (A. 43-44).

[3] In this petition, petitioner will refer to the concept of strict liability in tort as embodied in the Restatement as "Restatement § 402A." The full citation is 2 Restatement 347, *Torts* (2d) § 402A, and the comments and illustrations appended thereto.

STATUTORY PROVISIONS INVOLVED

The following relevant Federal statutes are reprinted in Appendix D: 28 U.S.C. § 1254 (A. 43); 28 U.S.C. § 1201 (c) (A. 43-44).

STATEMENT OF THE CASE

A. Statement of facts.

Petitioner, Clark Equipment Company (hereinafter referred to as "Petitioner" or "defendant"), manufactured a Clark Van Carrier, used in loading and unloading operations on the docks. Respondent, Wilkes Wirth (hereinafter "Mr. Wirth" or "plaintiff"), a longshoreman, commenced a bodily injury action in the United States District Court for the District of Oregon, based upon diversity of citizenship, against defendant and Matson Navigation Company. Mr. Wirth's action arose out of injuries sustained when he was struck by a Clark Van Carrier in Portland, Oregon on October 16, 1966, in the van storage area behind the dock at Terminal 4, Pier 2 (R. 1, 23; Tr. 8).

Plaintiff contended that defendant, manufacturer of the Clark Van Carrier (R. 1, 23), was liable in negligence and strict liability in tort as the supplier of unreasonably dangerous equipment. Plaintiff's case against Matson Navigation Company was founded upon unseaworthiness (R. 1, 23).

Plaintiff's diversity action was tried against both

defendants on September 9 and 10, 1969, before the Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting with a jury (Tr. 2, 140). At the conclusion of plaintiff's case in chief, the Court granted Matson Navigation Company's motion for a directed verdict (R. 1, 32; Tr. 158). Mr. Wirth did not appeal that ruling.

The District Court submitted the case to the jury against defendant Clark upon the theory of negligence, and withdrew the strict liability count. The jury returned a verdict for defendant Clark. Judgment was entered in favor of Clark and against plaintiff on September 11, 1969 (R. 1, 30).

The evidence revealed that plaintiff was injured during his employment in a container yard (R. 1, 23; Tr. 8, 142). Containers constitute a modern method of handling ships' cargoes. The cargo is preloaded, often at some distance from the dock, in "containers" or "vans" 20 to 24 feet long, and approximately 8 feet wide and 8 feet high, weighing, when fully loaded, up to 25 tons (Tr. 202, 225, 32). The bulk of these containers requires special ships, special cranes, large dock storage yards and special dockside handling equipment (Tr. 94-99). At Terminal 4, where plaintiff was employed, the cargo vans were loaded and unloaded from trucks and flatbed railroad cars and shifted about the dock by a Series 510 Clark Van Carrier manufactured by defendant (R. 1, 23; Tr. 233-235, 200, 224-225, 76-78). The Clark Van Carrier hoists the cargo van after straddling it. The machine

consists of a large frame, open through the center, with an engine mounted on top which drives the wheels by a chain drive. It weighs 30 tons unloaded, operates forward or backward, can move in a very short radius and can travel up to 20 miles per hour (Tr. 136, 174, 56, 178, 195, 230; Pl. Ex. 8B, 52D through 52L). The operator occupies an enclosed cage which shares, with an engine, a platform jutting out at the top rear of the machine. When the Clark Van Carrier is driven forward, a large portion of the machine is forward of the vehicle operator (R. 256, 99; Pl. Ex. 8B, 52D through 52L).

Plaintiff contended that the operator of the machine suffered visual limitation (Tr. 56, 61, 99-100, 106-107, 114-118, 225-226, 228; Pl. Ex. 16A).

Plaintiff was employed as a "block man" (Tr. 9, 10, 66). When the machine straddles a van preparatory to picking up a load from the trailer or flatbed truck, a block man stands below to release a "dog" which fastens the van to the trailer. Similarly, when the Van Carrier places a van down on the trailer of a flatbed truck, the block man blocks the van to the trailer by knocking the "dog" into place (Tr. 9, 10, 46, 66, 154). This work compelled plaintiff to be under and around the Clark Van Carrier.

Nevertheless, at or about the time of the accident, plaintiff was not working, but was "having a cigarette, waiting for something to happen." (Tr. 15.) No one actually saw the plaintiff struck, and no one actually knows where he was at the time of his acci-

dent. Plaintiff had no recollection of the incident. The driver of the Van Carrier looked down the passageway where plaintiff was allegedly struck prior to entering it; although possessed of unimpeded visibility at that time, the operator observed no person there (Tr. 66, 67). We may logically infer that plaintiff walked in front of the Van Carrier and suffered his injury. Both the operator of the Van Carrier and the plaintiff had worked with the machine in the past and were familiar with its condition, structure, and operation (Tr. 65, 153, 154).

Plaintiff tried the case on the theory that limitations placed upon the operator's field of vision made the Van Carrier dangerous to workmen and impelled a safer design in respect to safety features and vision aids. The parties adduced disputed testimony as to the practicality and necessity of additional safety features.

The United States District Court for the District of Oregon withdrew the strict liability count from jury consideration because the machine did not have a concealed defect; instead, the condition was open and obvious (Tr. 162-163, 256). Notwithstanding this ruling, plaintiff's opening brief in the Ninth Circuit was addressed to the contention that strict liability applied in Oregon to bystanders. (See Brief of plaintiff-appellant, *passim.)*

Defendant's response to plaintiff's arguments (Brief of defendant-respondent, *passim)*, pointed out that open and obvious conditions did not constitute

defects under the Restatement § 402A strict liability theory; thus, the Ninth Circuit was not required to determine whether or not Oregon would apply strict liability to the bystanders (Brief of defendant-respondent 10-11). Defendant remarked that plaintiff had cited no cases discussing the issue of whether or not strict liability was applicable to open and obvious conditions (Brief of defendant-respondent 12) and that the issues argued by the plaintiff were not truly representative of those raised by the District Court decision.

In the interim, the California Supreme Court rendered an aberration entitled *Pike* v. *Frank J. Hough Company*, 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P.2d 229 (1970). Plaintiff's reply brief seized upon this decision to change the thrust of his appeal and contend that open and obvious conditions constituted "defects" under California law; from this premise, he argued that Oregon would follow California's decision (see Reply Brief of plaintiff-appellant, *passim*).

An extensive time lag (caused by a heavy case load) separates briefing and argument in the Ninth Circuit. During that passage of time, several additional jurisdictions decided that an open and obvious condition did not constitute a defect under strict liability.[4]

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[4] See cases contained in Argument 2, infra, and in Appendix E. Many of these additional authorities, favoring petitioner's position, were forwarded to the United States Court of Appeals for the Ninth Circuit prior to oral argument.

During the instant appeal, the identical question was wending its way to the Oregon Supreme Court in a case entitled *Claud O. Askew* v. *Howard-Cooper Corporation et al.* Defendants in each case were represented by the same attorney. In *Askew*, the Oregon circuit court (general jurisdiction trial court) sustained defendant's motion for judgment of involuntary nonsuit on both negligence and strict liability counts on May 27, 1971. The issue there was identical to the present case: does an open and obvious condition constitute a "defect" under strict liability [and for purposes of negligence considerations] in Oregon? The plaintiff in *Askew* perfected his appeal on June 18, 1971.[5]

The parties argued the instant case before the United States Court of Appeals for the Ninth Circuit in San Francisco on December 10, 1971. Briefing in the Ninth Circuit had been completed prior to the trial court decision in *Askew*. During oral argument, counsel for defendant Clark advised the Ninth Circuit that the identical issue was pending in the Oregon Supreme Court, had been briefed, and would be argued in the near future. Counsel asked the Court to abstain from ruling in this case to allow the Oregon Supreme Court to decide the substantive legal issue. This was the first time that such information reason-

[5] Relevant portions of respondent's (defendant's) brief in *Askew* v. *Howard-Cooper Corporation, et al* are reprinted herein as Appendix E (A. 45-60), demonstrating the argument and authorities raised in the Oregon Supreme Court. This cause was argued before the Oregon Supreme Court Wednesday, March 1, 1972.

ably could be brought to the Ninth Circuit's attention because of the timing of the two appeals and the time lag between briefing and argument in the respective courts.[6]

Despite defendant's request that the Ninth Circuit abstain from deciding this important question of Oregon substantive law, pending the Oregon Supreme Court decision in *Askew*, the Ninth Circuit rendered judgment reversing the District Court and remanding this cause for a new trial on March 16, 1972 (A. 29-40). A timely petition for rehearing requested withdrawal of the opinion and application of the abstention doctrine. The Ninth Circuit denied petitioner's petition for rehearing on April 18, 1972 (A. 41).

Petitioner Clark Equipment Company prays that a writ of certiorari issue out of this Court to review the judgment of the United States Court of Appeals For the Ninth Circuit.

B. Basis for federal jurisdiction.

District Court jurisdiction is founded upon 28 U.S.C. § 1332, and jurisdiction of the United States Court of Appeals for the Ninth Circuit is premised upon 28 U.S.C. § 1291. Jurisdiction of this Court is

[6] The Ninth Circuit advises counsel that they do in fact record some oral arguments, but that said arguments, if recorded, are not available for any purposes. Counsel had hoped to transcribe and submit to this Court the record of the argument wherein he requested the Ninth Circuit to abstain pending the Oregon Supreme Court decision.

based upon 28 U.S.C. § 1254 and 28 U.S.C. § 2101 (c) (A. 43-44).

ARGUMENT

Three fundamental reasons appear for granting this writ. First, the Ninth Circuit has decided an important state policy question in the absence of Oregon law when it should have abstained from so doing since the identical question had been presented to the Oregon Supreme Court and was pending decision.[7]

Second, the Ninth Circuit has determined an important state policy question in conflict with the applicable Oregon law. The question decided recurs often. The decision is in derogation of the developing majority trend throughout the country.

Third, the Ninth Circuit decision ignores the necessary effect of the jury verdict for defendant on the negligence issue. If the jury determined that defendant was not negligent, *a fortiori*, the jury determined that the product was not "unreasonably dangerous" whether or not it was "defective."

1. The Ninth Circuit should have abstained from deciding an important policy issue of substantive law which was pending at that very moment before the Oregon Supreme Court.

For three decades this Court has developed a doctrine requiring federal courts, as the essence of fed-

[7] The *Askew* case was argued by counsel to the Oregon Supreme Court on Wednesday, March 1, 1972, at 1:30 p.m.; the Ninth Circuit opinion was rendered March 16, 1972, and rehearing was denied April 18, 1972.

eralism, to avoid forecasting state law, where there exists reasonable likelihood that the issue would be decided by the state court in the foreseeable future. In the instant case, the Ninth Circuit was timely advised of a pending case in the Oregon Supreme Court which would decide the substantive issue involved. The Court was asked to abstain and refused to do so. Its decision, undoubtedly contrary to the majority trend, inaccurately forecasts Oregon law.

The abstention doctrine appears to be rooted in *Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496, 499, 61 S. Ct. 643, 644-645, 85 L. Ed. 971 (1941). A Texas Railroad Commission order required that sleeping cars being operated within the state of Texas be continuously in charge of an employee having the rank and position of a pullman conductor. The case questioned the constitutionality of the statute under which this order was promulgated. This Court remanded the cause to the District Court, with directions that the parties pursue the action in the state courts, saying:

> ". . . Had we or they [lower court judges] no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination."

In the instant case, the Ninth Circuit has predicted Oregon law incorrectly. This decision disparages the essence of federalism.

Chief Justice Stone provided marrow to the concept in *Meredith* v. *City of Winter Haven*, 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943), when he required the presence of "special circumstances" in order to impel federal court declination to answer a question of state law. Some of the special circumstances discussed were (1) where abstention is in furtherance of a recognized and defined public policy, (2) where the question concerns the fiscal affairs of the state, (3) where the federal decision would create undue interference with state administrative functions, and (4) where federal action would cause unnecessary determination of a constitutional question. Particularly the Court should abstain in the instant case for, as Chief Justice Stone stated, 320 U.S. at 236, 64 S. Ct. at 12:

> ". . . It is the Court's duty to do so [abstain] when a suit is pending in the state courts, where the state questions can be conveniently and authoritatively answered, at least where the parties to the federal court action are not strangers to the state action. . . ."

This Court further refined the concept in *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959). This diversity case concerned a problem of interpretation of a state eminent domain statute. The Court listed two important countervailing interests which call for invoking the abstention doctrine: (1) the avoidance of a premature or unnecessary decision of a serious federal constitutional question, or (2) the avoidance of

the hazard of unsettling some delicate balance in the area of federal-state relationship. The second reason was found present by the majority. Mr. Justice Brennan, dissenting, asserted that the issue involved had been previously settled by the state, 360 U.S. at 35, 79 S. Ct. at 1076. In the present case, undoubtedly the substantive issue has not been decided by the Oregon Supreme Court, although it is presently pending before that tribunal. Thus, the abstention doctrine clearly applies.

Products liability represents "an unsettled state of the law."[8] Where such a situation exists, federal courts are clearly justified, in the interest of avoiding federal-state friction, to stay their hand until the state has determined its course of action. As said by this Court in *Harman* v. *Forssenius*, 380 U.S. 528, 534, 85 S. Ct. 1177, 1182, 14 L. Ed. 2d 50 (1965):

> ". . . The [abstention] doctrine, however, contemplates a deference to state court adjudication only be made where the issue of state law is uncertain."

Accord, *Davis* v. *Mann*, 377 U.S. 678, 690, 84 S. Ct. 1441, 1447, 12 L. Ed. 2d 609 (1964); *McNeese* v. *Board of Education*, 373 U.S. 668, 673-674, 84 S. Ct.

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[8] For example, on the question of whether or not strict liability in tort extends beyond sellers to lessors, compare *Cintrone* v. *Hertz Truck Leasing, Etc.*, 45 N.J. 434, 212 A.2d 769 (1965), with *Speyer, Inc.* v. *Humble Oil & Refining Company*, 275 F. Supp. 861 (W.D. Pa. 1967), aff'd 403 F.2d 766 (3d Cir. 1968). The instant case [see Argument 2, infra] presents a likewise unsettled area of the law, although the majority rule recognizes that the condition which is known and patent, open and obvious, cannot be "defective."

1433, 1436-1437, 10 L. Ed. 2d 622 (1963); *City of Chicago* v. *Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 83, 78 S. Ct. 1063, 1067, 2 L. Ed. 2d 1174 (1958); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 154, 89 L. Ed. 101 (1944). In the instant case, deference to state court adjudication is impelled because the issue of state law is now uncertain, but is certain to be decided in the near future.

As recently as last year, Mr. Justice Douglas wrote in *Wisconsin* v. *Constantineau*, 400 U.S. 433, 91 S. Ct. 507, 511, — L. Ed. 2d — (1971):

> ". . . Thus, our abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe."[9]

Mr. Chief Justice Burger, dissenting, observed, 400 U.S. at 442-443, 91 S. Ct. at 512:

> "This very wise doctrine is an essential one of policy and is a keystone of federalism. . . ."

Abstention is demanded here where the question of state law is unresolved but will be determined forthwith by the State Supreme Court. Products liability represents issues of "vital concern" to the state of Oregon and presents recurring issues. In that regard, the language of this Court in *Kaiser Steel Corporation* v. *W. S. Ranch Co.*, 391 U.S. 592, 594, 88 S. Ct. 1753, 1754, 20 L. Ed. 2d 835 (1968), concerning a question

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[9] Citing *Reetz* v. *Bozanich*, 397 U.S. 82, 90 S. Ct. 788, 25 L. Ed. 2d 68 (1970), and *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 79 S. Ct. 455, 3 L. Ed 2d 562 (1959).

of water rights in the arid state of New Mexico, seems salient:

> ". . . Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource."

Similarly, sound judicial administration demands that the parties in the instant case be given the benefit of the identical rule of law which will apply to all other parties in the future in the state of Oregon in this vital jural area. The Ninth Circuit erred in refusing to abstain.

2. The Ninth Circuit erroneously forecast Oregon law.

The manufacturer or seller of a product is not liable to a remote user, either under strict liability in tort or negligence theories, if the condition causing the harm is open, obvious, apparent, patent, and known to the user. Such a condition does not make the product defective or unreasonably dangerous, and the authorities almost universally impel a judgment for the manufacturer and seller as a matter of law.[10]

The producer of goods does not retain control of his product once it enters the stream of commerce. The manufacturer is not required to build the ultimate in safety; his duty is merely to produce a product

[10] Appendix E (A. 45-60) contains the salient portions of respondent's brief in *Askew* v. *Howard-Cooper Corporation* in the Oregon Supreme Court, and sets forth this position (as argued to that Court) in greater detail.

which is reasonably fit, as represented, without patent perils. All persons know that heavy instruments will crush, sharp devices will cut, and that a heavy piece of machinery will cause injury if one steps in front of it. The manufacturer need not warn or protect against such obvious potentialities.

Oregon has adopted the Restatement § 402A concept of strict liability in tort. *Heaton* v. *Ford Motor Co.*, 248 Or. 467, 470, 435 P.2d 806 (1967).

Before liability can be imposed upon a manufacturer or supplier under this concept, plaintiff must establish that the product was in a *defective condition* when it left the hands of the supplier. A "defective condition" is defined as "a condition not contemplated by the ultimate consumer, which would be unreasonably dangerous to him." Restatement § 402A, comment g. In the instant case, the Clark Van Carrier was in the identical condition contemplated by the user and consumer and hence was not defective. Any limitation on the operator's vision was known and apparent to Mr. Wirth and to the operator, both of whom were familiar with the machine.

Furthermore, liability does not attach unless the alleged "defective condition" renders the product "unreasonably dangerous." *Heaton* v. *Ford Motor Co.*, supra, 248 Or at 470; Restatement § 402A. The Restatement defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the commun-

ity as to its characteristics." Restatement § 402A, comment i.

All dangers which the plaintiff asserted were open, obvious, and fully contemplated by the plaintiff and his employer. The strict liability in tort doctrine applies solely to latent or hidden dangers. *Maas* v. *Dreher*, 10 Ariz. App. 520, 460 P.2d 191 (1969).

The decisions from jurisdictions which, like Oregon, follow the Restatement § 402A rule almost universally deny recovery for injuries allegedly caused by open and obvious conditions. (See cases collected in Appendix E (A. 49).[11] Included in such decisions are two from the Ninth Circuit, *Hardy* v. *Hull Corporation*, 446 F.2d 34 (9th Cir. 1971), and *Tomicich* v. *Western-Knapp Engineering Co.*, 292 F. Supp. 323 (D. Mont. 1968), aff'd 423 F.2d 410 (9th Cir. 1970). The Ninth Circuit ignored its own decisions here!

The rationale of this norm resembles that expressed in the myriad negligence decisions collected in the appendix (Appendix E, A. 52-54). The designer, manufacturer, or seller of a product is only obligated to produce and sell goods which are what they are represented or purported to be; there is no legal obligation to create a product embodying only features representing the ultimate in safety. *Warner* v. *Kewanee Machinery & Conveyor Company*, 411 F.2d 1060, 1066 (6th Cir. 1969), cert. den. 398 U.S. 906, 90 S. Ct. 1685, — L. Ed. 2d — (1970). Even the

[11] The New Jersey Court has ruled contrarily since the *Askew* brief was filed.

shipowner, who owes the absolute warranty of seaworthiness, need not supply the newest, best, or safest appliances, but only those which are *reasonably fit* for the voyage undertaken. E.g., *Doucette* v. *Vincent*, 194 F.2d 834 (1st Cir. 1952).[12]

Products may be used by a consumer for varying tasks; the user, not the manufacturer, has *control* over the device, and the party in control can better see to safety requirements under particular circumstances of use. See, e.g., *Hardy* v. *Hull Corporation*, supra; compare *Bexiga* v. *Havir Manufacturing Corp.*, 114 N.J. Super. 397, 276 A.2d 590 (1971).[13] In the instant case, the condition was open, obvious, and well known to the plaintiff and to all who would use the Van Carrier. The user, the person in control, was responsible to determine how to best operate the machine, given the alleged visual limitations. No duty devolved upon the manufacturer or the seller to provide plaintiff with a different machine. The Clark Van Carrier was what it was represented to be and had no hidden danger.

District Judge William P. Gray, sitting by designation, authored the Ninth Circuit decision (A. 29). He recognized that the law of the forum controlled the applicability of the doctrine of strict liability in diversity cases (A. 32-33); *Hardy* v. *Hull Corporation*, supra, 446 F.2d 34 (9th Cir. 1971). His

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[12] The shipowner need not furnish an "accident-free ship," *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960).

[13] See note 11.

discussion of applicability of the doctrine of strict liability by "bystanders" (A. 33, et seq) is irrelevant to the decision of the District Court and to this petition.

The Ninth Circuit erroneously relied upon *Pike* v. *Frank G. Hough Co.*, 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P.2d 229 (1970) (A. 37-40), and remarked:

> "The mutual respect held by the courts of California and Oregon for the developments of the law in those states is well known and creates a reasonable inference that the *Pike* decision would be considered to be of substantial precedential value in Oregon." (A. 38).

By footnote, District Judge Gray noted that the state of Washington had approved the reasoning in *Pike* in *Palmer* v. *Massey-Ferguson, Inc.*, 3 Wash. App. 508, 476 P.2d 713 (1970) (A. 38).

First, mutual respect of jurisdictions notwithstanding, Oregon has not followed California's lead in strict liability cases. For example, strict liability in tort was introduced to Oregon by Chief Justice O'Connell's opinion in *Wights* v. *Staff Jennings*, 241 Or. 301, 405 P.2d 624 (1965). In that case, after a lengthy discussion of California decisions, including *Escola* v. *Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436 (1944), the Oregon Supreme Court *rejected* this premise saying, 241 Or. at 309:

> ". . . It seems to us that the enterprise liability rationale employed in the Escola case proves too much and if adopted would compel us to apply the principle of strict liability in all future cases where the loss could be distributed."

Thus, at the very outset, the Oregon Supreme Court rejected California's premise in the concept of strict liability in tort. There is no reason to believe that Oregon will accept California's *Pike* aberration in the instant milieu.

Second, in *Pike*, the California Court virtually decreed that it would do as it pleased in the field without reference to other authority. The Court attempted to distinguish the case by mentioning that while the defect might be clear to the operator of the machine (that he could not see a certain distance because of a blind spot) this "defect" was not necessarily known and perceptible to a bystander (467 P.2d at 234). In the instant case, the alleged bystander, Mr. Wirth, knew of the machine and its obvious limitations and there is no question of his awareness equal to that of the operator. However, assuming that the defect was "obvious," California decided that the "modern trend" would not preclude liability. Of course, it cited only three law school professors, Harper, James, and Noel, as authorities, and ignored the universal rule to the contrary (A. 58-59). The decision appears to be premised upon "enterprise liability," the doctrine which the Oregon Court expressly rejected in *Wights* v. *Staff Jennings*, supra!

In addition, the California Court failed to come to grips with the real essence of strict liability. It focused almost exclusively upon whether or not a jury question existed as to whether a blind spot made the machine "unreasonably dangerous," and entirely

missed the threshold question of whether or not the condition constituted a "defect." Thus, the decision either *ignored* Restatement § 402A, to which the Oregon Court and many others subscribe, or chose to apply only a *part* of the rule.

The identical error permeates the Ninth Circuit opinion of District Judge Gray. He concludes (A. 40):

> ". . . Suffice it to say, at least, that it was for the jury to determine whether the nature and extent of the defects in the carrier that caused the plaintiff's injuries were obvious to him."

That begs the question; the issue is whether or not the Clark Van Carrier was defective. It is easy to decide a case if you assume away the issue.

The Ninth Circuit misplaced reliance upon *Palmer* v. *Massey-Ferguson, Inc.*, supra, 3 Wash. App. 508, 476 P.2d 713 (1970). This inapposite decision is distinguished by its facts: the existence of a latent defect, 476 P.2d at 714:

> "Plaintiff turned down the engine to idle speed, disengaged a belt-tightening device that acted as a clutch, adjusted the hay pickup mechanism and then reached down to adjust the drawbar. . . . the characteristic shaking associated with movement of the baler mechanism ceased before plaintiff reached under the machine. When he did so reach, *the mechanism was suddenly put into unexpected motion.* Plaintiff's hand was struck and then smashed into the front plate, causing him injury, ..." [Emphasis supplied.]

The fact that the Washington Appellate Court was misled by the California decision in *Pike* v. *Frank G. Hough Co.*, supra, and cited that case as dicta, is not likely to mislead the Oregon Supreme Court.

The Ninth Circuit misconceived the issue, begged the question, and misforecasted Oregon law. California to the contrary notwithstanding, Oregon's adherence to the Restatement concept will require proof of a defect before the question of unreasonable danger is reached, and will determine that an open and obvious condition, one which is patent, known, and apparent to users and consumers, will not render a product defective.

3. Assuming, as the Ninth Circuit did, the existence of a defect, no reversible error was committed because the jury verdict for defendant, a fortiori, determined that the product was not "unreasonably dangerous" to the user or consumer.

The District Court submitted the negligence issue to the jury, which returned a defendant's verdict. The record contains substantial evidence to support that verdict. It cannot be overturned *sans* legal error and it cannot be ignored.

In addition, that verdict has a collaterally estopping effect upon the issue of strict liability. If the decision of the jury necessarily decided the strict liability issue in salient part, the Ninth Circuit erred in reversing and remanding the cause for a new trial.

As we have seen, the Ninth Circuit fell into the

Pike trap and assumed away the very issue, that of defect. The Oregon Supreme Court held that proof of strict liability in tort is a two-step process in *Heaton* v. *Ford Motor Coompany*, supra, 248 Or. 467, 470, 435 P.2d 806 (1967):

> "... In the case at bar, we now adopt Section 402A and hold that if the product is *in fact* unreasonably dangerous the manufacturer is liable for the harm caused by such a defect. It is not necessary to prove the product is 'ultrahazardous,' nor that it was placed on the market 'negligently.' It is necessary, however, to prove that it is dangerously defective." [Emphasis supplied.]

An unreasonably dangerous product which is not defective does not raise the spectre of strict liability in tort. A defective product which is not unreasonably dangerous poses no issue of liability. The two tests must coalesce.

The Oregon Supreme Court in *Heaton* v. *Ford Motor Co., supra*, continued, 248 Or. at 471:

> "An article is dangerously defective when it is in a condition unreasonably dangerous to the user. Restatement (Second) of Torts § 402A. Unreasonable, in this context, means dangerous to an extent beyond that which would be contemplated by the ordinary purchaser. Restatement (Second) of Torts § 402A, comment g. . . ."[14]

Thus, it is clear from the *Heaton* language that even if a defect is assumed, as was done by the Ninth

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[14] The author of *Heaton* v. *Ford Motor Co.*, supra, is Justice Goodwin, now of the United States Court of Appeals for the Ninth Circuit.

Circuit, the product was not unreasonably dangerous because that is a test of reasonableness identical to the reasonableness test employed in the negligence count, and the jury determined the negligence issue for the defendant.[15] Thus, the Ninth Circuit not only misforecast Oregon law, but also misapplied it.

State and federal decisions emanating from Oregon presage an identical result. For example, in *Anderson* v. *Klix Chemical Co.*, 256 Or. 199, 203, 472 P.2d 806 (1970), defendant argued "Logically failure to warn (effectively) conceptually resembles negligence, not strict liability." (Resp. Br. 15). The Oregon Supreme Court agreed saying:

> ". . . Conceptually, defendant appears to be correct. This aspect of 'strict liability,' failure to warn of the dangers of an otherwise nondefective product, does revert to a negligence basis for liability. . . ."

In other words, Justice Denecke recognized that once the question of whether or not a "defect" existed was determined, the remaining issue under strict liability —whether or not a product was unreasonably dangerous—was founded upon negligence concepts.

Judge Kilkenny (now of the Ninth Circuit) seems to have reached a similar result in *Brizendine* v. *Visador Company*, 305 F. Supp. 157, 159-161 (D. Or. 1969). *Heaton* v. *Ford Motor Co.* was cited by Judge Kilkenny therein for the proposition that a plaintiff

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[15] This identical argument was made to the Ninth Circuit on oral argument.

can show that a product is defective by (1) proving a mistake or flaw in the design, (2) proving a mistake or flaw in the manufacture, or (3) failing in proof of (1) or (2), by showing that the product did not perform in keeping with the *reasonable expectations* of the user or consumer "thus creating an inference of specific defect for the trier of fact. Of course, the defective condition proved, or inferred, must be shown to be unreasonably dangerous." Within that statement, Judge Kilkenny is speaking of "unreasonably dangerous" and "reasonable expectation" which are negligence terms.

Similarly, in *McGrath* v. *White Motor Corp.*, 92 Adv. Sh. 777, 787, — Or. —, 484 P.2d 838 (1971), the Oregon Supreme Court remarked that the plaintiff was merely required to prove a "lesser degree of danger, i.e., unreasonably dangerous" as defined in the Restatement § 402A. Once again, the Oregon Court appears to be using the term "unreasonably dangerous" as analogous to those terms in the negligence milieu.

The latest Oregon decision of importance is *Cornelius* v. *Bay Motors, Inc.*, 92 Adv. Sh. 799, — Or. —, 484 P.2d 299 (1971). Justice Tongue wrote, 92 Adv. Sh. at 805:

> "Regardless of the application of § 402A to dealers in used automobiles and to 'bystanders' and other third parties, we hold that the facts of this case were such that the jury could have properly found that there was no liability under § 402A in this case.

"By the terms of § 402A, the rule of strict liability is applicable to the sale of a 'defective product *unreasonably dangerous* to the user or consumer.' According to Comment i under § 402A:

> " '* * *. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.'

"This court, in *Heaton* v. *Ford Motor Company, supra,* held that the application of this test under § 402A is ordinarily a question of fact to be decided by a jury. Thus, at p 472, we said that:

> " '* * * it is for the jury rather than the court to say in the ordinary case whether a given product failed to meet the standard.'

and, at 474:

> " 'The jury is supposed to determine the basically factual question of what reasonable consumers do expect from the product.' " [Emphasis and deletion by Court.]

The standard of reasonable expectation and reasonable danger is a fact question to be decided by the jury; in the case at bar, that fact question is identical to the fact question posed by the negligence issue and decided by the jury adversely to the plaintiff. Therefore, plaintiff was not harmed by his alleged [and assumed] error in removing the strict liability count from the jury's consideration, since the jury deter-

mined the essential underlying issue, the foundational fact, contrarily to the plaintiff.

CONCLUSION

For the reasons set forth, petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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July, 1972

APPENDIX A

WILKES WIRTH,

Plaintiff-Appellant,

v.

CLARK EQUIPMENT COMPANY,
a corporation,

Defendant-Appellee.

No. 25293

United States Court of Appeals,
Ninth Circuit

March 16, 1972.

Rehearing Denied April 18, 1972.

Raymond J. Conboy (argued), Frank Pozzi, of Pozzi, Wilson & Atchison, Portland, Or., for plaintiff-appellant.

Roland F. Banks, Jr. (argued), James F. Spiekerman, of Souther, Spaulding, Kinsey, Williamson & Schwabe, John R. Brooke, Portland, Or., for defendant-appellee.

Before HAMLIN and MERRILL, Circuit Judges, and GRAY, District Judge.*

WILLIAM P. GRAY, District Judge.

The plaintiff in this diversity action was a longshoreman on the waterfront at Portland, Oregon, whose duties required him to work as a part of a crew

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* Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

attending a thirty-ton motor driven wheeled vehicle, known as a van carrier, which ran over him, thereby inflicting severe injuries that included the loss of a leg. Defendant Clark Equipment Company had manufactured the van carrier and had sold it to Matson Navigation Company, in whose service it was being operated at the time of the accident.

The plaintiff sought recovery on the basis of two separate theories, namely negligence in the design and manufacture of the carrier, and strict liability by reason of the manufacture and sale of a carrier that was in an unreasonably dangerous and defective condition.

At the conclusion of the trial, the judge submitted to the jury the issue of negligence (and a verdict for the defendant resulted), but he withdrew from the jury the matter of strict liability, ruling that, as a matter of law, the plaintiff could not recover on that basis. We agree with the plaintiff's contention, asserted at the trial and on appeal, that the issue of strict liability should have been submitted to the jury, and we accordingly reverse.

Much of the cargo transported by Matson's ships was packed in large wooden vans (or containers or boxes) whose dimensions were approximately 24′x8′x 8′, and whose loaded weight was many tons. The carrier concerned was designed and manufactured for the purpose of straddling such a van, lifting it from a flat bed trailer, or from the pavement, or from the top of another van, and transporting it to another location in the waterfront area. Such work requires

that the carrier be a large and heavy machine, and it is, namely, 26 feet long, 13 feet wide, and 18½ feet high. It can travel at speeds up to 20 miles per hour. The operator sits in a cab at the rear of the top of the vehicle, near the motor. A representative of the defendant testified that this location of the cab was considered to be the best place to facilitate the ability of the operator to drive the carrier and handle the containers. However, because of the location of the cab, the forward view of the driver is seriously limited to the extent that he cannot see the ground for a distance of 51′ 9″ in front of his right front wheel. There was testimony to the effect that similar carriers "kept running into things," and that light poles and fire hydrants located in their areas of operation had to be protected by buffers of concrete or steel.

The carrier did not contain wheel guards, or "cow catchers," nor did it contain mirrors or closed circuit TV cameras and monitors for the purpose of enhancing the operator's forward vision, and the testimony was conflicting as to the practicability of such safety installations on this machine.

The noise of the engine could be heard all over the yard, a fact that provided a constant reminder of the carrier's presence, but not necessarily of its approach. The testimony indicated that Matson had affixed a bell to the carrier that was actuated when the vehicle was in motion, but this bell could not be heard if the motor was turning faster than idling.

The plaintiff's function was that of a "block man,"

whose duty was to disengage or engage the fasteners that held a van securely on a trailer, in order to facilitate the carrier in lifting the van from the trailer or in depositing it thereon. Thus, the plaintiff's work required him regularly to be in close proximity to the carrier.

On the occasion of the accident, the crew had completed its assignments for the day, and the driver was in the process of moving the carrier to the parking area. His route took him the length of a 30-foot wide aisle that was formed by the locations of two rows of vans. As the driver turned to enter this corridor, he could see the length of it and did not observe the plaintiff; after he had proceeded the entire length of the corridor and had parked the carrier, he learned that his right front wheel had run over the plaintiff The evidence indicated that at the time the carrier proceeded down the corridor, the plaintiff was leaning against one of the vans that formed the corridor and was having a smoke.

In light of the foregoing the trial judge was clearly justified when he ruled that ". . . there is evidence that this thing, the way it was used, was an ultra-hazardous piece of machinery and that this condition caused Mr. Wirth damages."

The trial judge recognized that the law of the forum state controls the applicability of the doctrine of strict liability in a diversity case. Hardy v. Hull Corporation, 446 F.2d 34 (9th Cir. 1971). He thereupon undertook to determine how the courts of Ore-

gon would have ruled in this situation, a task that was made difficult by the absence of any controlling statute or reported decision. His starting point, as is ours, was the fact that Oregon has expressly adopted section 402A of the Restatement (Second) of Torts, which provides, in pertinent part, that "One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer. . . ."[1] Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967).

The trial court concluded, however, that it would be an "unwarranted extension" of Oregon law to impose strict liability in favor of a bystander when the equipment was custom-built to the purchaser's specifications and contained no concealed defect.

From our own reading of Oregon law, we believe that to permit the jury in this case to find in accord-

[1] The full text of section 402A is as follows:

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

ance with strict liability would not have been an unwarranted extension of Oregon law, if it would have involved any extension at all.

With respect to the matter of "bystander," the Restatement discussion of section 402A contains a caveat (1) as to whether such rule covers ". . . harm to persons other than users or consumers." This caveat would, of course, include bystanders.

However, the Restatement comment l asserts that a "user," within the meaning of section 402A, need not have been the purchaser or the owner of the product. "He may be a member of the family of the final purchaser, *or his employee*, . . ." (Page 354) (Emphasis added).

Moreover, the comment on the caveat (comment o) refers to the distinction between users and "casual bystanders," such as "employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile." The comment then asserts that "There may be no essential reason why such plaintffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection of casual strangers." (Pages 356-7).

The plaintiff in this case was not a "casual

stranger." He was an employee of the purchaser of the machine; his duties as block man were an integral part of the functioning of the machine; he was obliged to work in close proximity to the machine; and the safety deficiencies that the trial court found to exist in the carrier created a particular hazard to a person in the plaintiff's position. A trier of fact could readily have found that the plaintiff was a "user" of the machine and that he was no more a bystander than was the driver.

On the other hand, the trier of fact could find it significant that the plaintiff was not actually performing any duties at the particular moment of the accident, but instead was, in effect, "standing by," and therefore was not a user of the product. Even under these circumstances, which would label the plaintiff as a bystander, we conclude that a verdict in his favor would not be contrary to Oregon principles with respect to the law of strict liability. This conclusion has been influenced by several decisions, none of which are controlling, but which, together, appear to us to point the way:

(a) In Blake v. Orchards, 249 Or. 437, 437 P.2d 757 (1968), a motor driven brush cutter, manufactured by the defendant, threw a rock which hit and injured the plaintiff, who presumably was a bystander or was passing by. The trial court submitted to the jury the issue of strict liability as follows:

"You are instructed that a manufacturer who makes and sells brush cutting machinery which by

reason of a defective design or inadequate guarding causes an extrahazardous condition for persons in the vicinity of its use is strictly liable to such persons for injury and damage caused by such defective design or such inadequate guarding." (Page 758).

The jury found for the plaintiff, but the resulting judgment was reversed by the Oregon Supreme Court because the plaintiff had pleaded only negligence and had not asserted a cause of action for strict liability. However, the opinion permits the inference that the court had no criticism of the above quoted instruction as stating the law of strict liability that would be applicable to the case under appropriate pleading.

(b) Brizendine v. Visador Co., 305 F. Supp. 157 (D. Oregon 1969), involved a door light that had been manufactured by the defendant and installed on a door of a church. As one young man undertook to open the door, he lost his balance and his hand struck the glass of the door light. The glass shattered and some of its particles flew into the face of the plaintiff, who had been standing at or near the door. Judge Kilkenny, trying the case without a jury and in applying Oregon law, found to be present all of the factors necessary for the imposition of strict liability and rendered judgment for the plaintiff accordingly.

(c) In Cornelius v. Bay Motors, Inc., 484 P.2d 299, 302-303 (Or. 1971), the Oregon Supreme Court assumed, without deciding, that the benefits of the rule of section 402A extend to bystanders; but it expressly reserved ruling upon the matter because

such a determination was not necessary to the decision.

(d) The opinion in Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P.2d 229 (1970), was published subsequent to the decision here appealed from. The facts in the two cases are substantially identical, the *Pike* case involving a large "paydozer" whose function was to spread and tamp dirt fill deposited by dump trucks. The decedent whose job it was to direct the trucks to the appropriate spots for dropping their loads, was standing with his back to the paydozer and some thirty feet behind it. The driver of the paydozer, hampered by problems of visibility similar to those pertaining to the carrier here concerned backed into the decedent and killed him. The California Supreme Court reversed a judgment of nonsuit that had been entered by the trial court under the assumption that the doctrine of strict liability was inapplicable. In the course of an extensive opinion, it was noted that California courts extend protection to bystanders in products liability cases, and the opinion concluded as follows:

> "Of course, we do not decide whether the paydozer is in fact unreasonably dangerous for its intended use, but only that plaintiffs' evidence was sufficient to support a jury verdict in their favor. A jury could decide that an earth-moving machine with a 48-foot by 20-foot rectangular blind spot was dangerous 'to an extent beyond that which would be contemplated by the ordinary consumer who purchased it [or by a bystander], with the ordinary knowledge common to the com-

munity as to its characteristics.' (Rest. 2d Torts, § 402A, com. i, at p. 352)." (2 Cal. 3d at 477, 85 Cal. Rptr. at 637, 467 P.2d at 237). (Bracketed clause in the opinion).

The mutual respect held by the court of California and Oregon for the developments of the law in those states is well known and creates a reasonable inference that the *Pike* decision would be considered to be of substantial precedential value in Oregon.[2]

We think that the custom-built concept need not be fatal to the plaintiff's case. In the first place, it was at least a question of fact as to whether the carrier was custom-built in any aspect that is relevant here. The defendant manufactured its carriers only to order, but the basic structure of the machine here concerned was as developed and advertised by the defendant in its series 510. It is true that in the manufacture of the subject carrier several modifications of the series 510 design were made at the suggestion of the purchaser; but a representative of the defendant admitted in his testimony that none of these changes had anything to do with the problem of the operator's restricted vision.

Also, even if the machine had been fully custom made, are by no means convinced that this circumstance would prevent this plaintiff from recovery un-

[2] We think it of more than geographical significance that the Court of Appeals of the State of Washington has expressed approval of the reasoning in *Pike*. See Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 476 P.2d 713, 719 (Wash.-App. 1970).

der the doctrine of strict liability. Comment g to section 402A of the Restatement of Torts says that the strict liability rule ". . . applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." The evidence at the trial indicated that officials of Matson were aware of the limited visibility afforded the operator of the carrier, as would be expected if the product were completely custom made. But there was no showing that the *plaintiff* had any such awareness and, as hereinabove discussed, a jury could readily find that he was an ultimate "user," within the meaning of the rule.

We quote again from the opinion in the California case of Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 85 Cal. Rptr. 178, 467 P.2d 229 (1970):

> "Defendant contends that the danger of being struck by the paydozer was a patent peril and, therefore, that it had no duty to install safety devices to protect against an obvious danger. We do not agree. First, although all vehicles contain the potential of impact, it is not necessarily apparent to *bystanders* that the machine operator is incapable of observing them though they are 30 to 40 feet behind the vehicle and in its direct path. The danger to bystanders is not diminished because the purchaser of the vehicle is aware of its deficiencies of design." At 2 Cal. 3d 473, 467 P.2d at 234, 85 Cal. Rptr. at 634 (Emphasis in the opinion).

The *Pike* opinion goes farther and suggests

that ". . . even if the obviousness of the peril is conceded, the modern approach does not preclude liability solely because a danger is obvious," and that " 'Surely it is well within the framework and spirit of [recent] common law modifications to require reasonable care to protect even the buyer himself from what may be foreseen as an unreasonable danger to him." (2 Cal. 3d at 474, 467 P.2d at 235, 85 Cal. Rptr. at 635, quoting from Harper and James, The Law of Torts, page 1545). We need not seek to determine here whether such a concept would be accepted by the courts of Oregon. Suffice it to say, at least, that it was for the jury to determine whether the nature and extent of the defects in the carrier that caused the plaintiff's injuries were obvious to him.

Reversed and remanded for a new trial in accordance with this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILKES WIRTH,

Plaintiff-Appellant,

vs.

CLARK EQUIPMENT COMPANY,
a corporation,

Defendant-Respondent,

and

MATSON NAVIGATION COMPANY,
a corporation,

Defendant.

No. 25,293

On Petition for Rehearing

Before: HAMLIN and MERRILL, Circuit Judges,
and GRAY, District Judge

Respondent's petition for rehearing herein is denied.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil Action File No. 68-318

WILKES WIRTH,

vs.

CLARK EQUIPMENT COMPANY,
a corporation,

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Robert C. Belloni, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged the plaintiff take nothing, the action be dismissed on the merits and the defendant Clark Equipment Company recover of the plaintiff Wilkes Wirth its costs of action.

Dated at Portland, Oregon, this 11th day of September, 1969.

/s/ Donal D. Sullivan
Clerk of Court
DONAL D. SULLIVAN

APPENDIX D

28 U.S.C. § 1254: *Courts of appeals; certiorari; appeal; certified questions*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 2101. *Supreme Court; time for appeal or certiorari; docketing; stay*

* * * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety

days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

APPENDIX E

Selected portions from Respondents' Brief (pp. 7-19) in *Claud O. Askew* v. *Howard-Cooper et al* (pending, Oregon Supreme Court, argued March 1, 1972).

SUMMARY OF ARGUMENT

The manufacturer or seller of a product is not liable to a remote user, either under strict liability in tort or negligence, if the condition causing the harm is open, obvious, apparent, patent, and known to the user. Such a condition does not make the product "defective" or "unreasonably dangerous." The authorities admost universally impel a judgment for the manufacturer and seller as a matter of law.

The producer of goods does not retain control of his product once it enters the stream of commerce. The duty of providing a safe place to walk or work may be visted [sic] only upon one in control. The manufacturer thus need not build the ultimate in safety. His duty is to produce a product that is reasonably fit, as represented, without latent perils. All persons know that heavy instruments will crush, sharp devices will cut, and a fall from a high place will cause harm. The manufacturer need not warn or protect against such obvious potentialities.

* * * * *

RESPONDENTS' ANSWER TO APPELLANT'S ASSIGNMENT OF ERROR NO. I

The circuit court correctly granted defendants' motions for judgments of involuntary nonsuit because the alleged defect was open and obvious to the user.

ARGUMENT

A manufacturer or seller of a product is not liable to a user or consumer, either under theories of strict liability in tort or negligence, if the condition allegedly causing the harm was open, obvious and known to the user or consumer.

A. Strict liability

Oregon has adopted the Restatement concept of strict liability in tort as expressed in 2 Restatement 347, Torts (2d) § 402A (hereinafter sometimes referred to for the sake of brevity as "Restatement 402A"). *Heaton* v. *Ford Motor Co.*, 248 Or 467, 470, 435 P2d 806 (1967).

Before liability can be imposed upon the manufacturer or seller under this doctrine, the plaintiff must establish that the product was in a defective condition when it left the hands of the supplier. A "defective condition" is explained:

> "g. *Defective Condition. The rules stated in this Section apply only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which*

> *would be unreasonably dangerous to him.* * * *. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained." 2 Restatement 351, Torts (2d) § 402A comment g. [Emphasis supplied.]

Plaintiff alleged, and attempted to prove, that the lumberjack was defective

> "in that the grease fittings which require daily lubrication were placed on top of the front of said loader, which was a portion of said machine where persons must go, and there were no necessary ladders, steps, step-plates, foot plates, running boards, walkways, grab irons, or handrails provided for a safe and adequate means of access and egress from the top of said front end of the Wagner loader as above described, and that said Wagner loader was so designed and manufactured that it was necessary for a man, in the proper maintenance of said Wagner loader, to climb on top of the front end of said Wagner loader." (Ab. 21-22).

The lumberjack cannot be said to be "in a condition not contemplated by the ultimate consumer" as required by Restatement 402A, comment g.

Both plaintiff and his employer were fully cognizant of these conditions. Mr. Askew admitted that there was no ladder or other mode of climbing on top of the lumberjack (Tr. 16) and that there were no

obvious means of ascent or descent (Tr. 45). The machine did not mislead him in any way; indeed, he clambered up and down the vehicle for many months (Tr. 9, 18-20). As plaintiff's witness, Mr. Buckland, remarked, there was nothing on the lumberjack which would cause anybody to believe that the manufacturer or seller expected them to climb on top of the boom (Tr. 74-75). The lumberjack service manual did not suggest scrambling up the machine to perform daily tasks of lubrication (Ex. 1) and common sense warned against this procedure.

Furthermore, liability does not attach unless the alleged "defective condition" renders the product "unreasonably dangerous." *Heaton* v. *Ford Motor Co.*, supra, 248 Or at 470; Restatement 402A. "Unreasonably dangerous" is defined as:

> "i. *Unreasonably Dangerous.* The rules stated in this Section apply only where the defective condition of the product make it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption * * *. That is not what is meant by 'unreasonably dangerous' in this Section. *The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.* * * *." 2 Restatement 352, Torts (2d) § 402A, comment i. [Emphasis supplied.]

All of the alleged dangers which plaintiff asserted were open, obvious, and fully contemplated by plain-

tiff and his employer. The strict liability in tort rule applies solely to latent or hidden dangers. *Maas* v. *Dreher*, 10 Ariz App 520, 460 P2d 191 (1969).

The decisions from jurisdictions such as Oregon which follow the Restatement rule almost universally deny recovery for open and obvious conditions:

Hardy v. Hull Corp., 446 F2d 34 (9th Cir 1971).

Bartkewich v. Billinger, 432 Pa 351, 247 A2d 603 (1968).

Maas v. Dreher, supra.

Tomicich v. Western-Knapp Engineering Company, 292 F Supp 323 (D Mont 1968), aff'd 423 F2d 410 (9th Cir 1970).

Morrow v. Trailmobile, Inc., 12 Ariz App 578, 473 P2d 780 (1970).

Downey v. Moore's Time-Saving Equipment, Inc., 432 F2d 1088 (7th Cir 1970).

Warner v. Kewanee Machinery & Conveyor Company, 411 F2d 1060 (6th Cir 1969), cert den — US —, 90 S Ct 1685 (1970).

Bexiga v. Havir Manufacturing Corp., 114 NJ Super 397, 276 A2d 590 (1971).

Fisher v. Johnson Milk Co., 383 Mich 158, 174 NW2d 752 (1970).

Brown v. General Motors Corporation, 355 F2d 814 (4th Cir 1966).

Cf Myers v. Montgomery Ward & Company, 252 A2d 855, 864 (Ct App Md 1969).

Cf Blankenship v. Morrison Machine Company, 255 Md 241, 257 A2d 430 (1969).

Compare, Murphy v. Eaton, Yale & Towne, Inc., 444 F2d 317 (6th Cir 1971) (implied warranty).

The rationale of the norm is similar to that expressed in the myriad negligence decisions, infra. The designer, manufacturer or seller is only obligated to produce and sell goods which are what they are represented or purport to be; there is no legal obligation to create a product embodying only features representing the ultimate in safety. *Warner* v. *Kewanee Machinery & Conveyor Company*, supra, 411 F2d at 1066. Even the shipowner who owes the absolute warranty of seaworthiness need not supply the newest, best, or safest appliances, but only those which are *reasonably fit* for the voyage undertaken. E.g., *Douchette* v. *Vincent*, 194 F.2d 834 (1st Cir. 1952).[2]

Products may be used by the consumer for varying tasks; the user, not the manufacturer, has *control* of the device, and the person in control can better see to safety requirements under the particular circumstances of use. See, e.g., *Bexiga* v. *Havir Manufacturing Corp.*, supra; *Hardy* v. *Hull Corporation*, supra. In the instant case, the condition was open, obvious, and well known to plaintiff (e.g., Tr. 45) and to all who perceived the lumberjack (Tr. 74-75). The user-employer, the person in control, was responsible to decide how to lubricate the vehicle. The normal location for accomplishing routine maintenance is at a hoist, platform, scaffold or other stable place. Sawmills have a ready supply of stumps or cut cross-sections which

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[2] See also, cases collected in Foley, Ridgway K., Jr., "A Survey of the Maritime Doctrine of Seaworthiness," 46 Or. L. Rev. 369, 373, n. 8. The shipowner need not furnish an "accident-free" ship. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960).

would form stable platforms from which to grease the two fittings. Obviously, a small cross-section or step-ladder was the only necessary equipment because plaintiff could almost touch the fittings from the ground (Ex. 5). Routine maintenance is ordinarily accomplished at a location where all available aids are easily accessible. No duty devolved upon the manufacturer or seller to provide the plaintiff with a different place to perform maintenance or a differently designed machine.

Plaintiff's arguments premised upon the defenses of contributory negligence and assumption of the risk (App. Br. 5) manifest the muddle of Restatement 402A. Assumption of the risk, not contributory negligence, is a defense to a strict liability claim (Restatement 402A, comment n). Coincidentally, strict liability demands that a product be "unreasonably dangerous" (Restatement 402A, comments g, i, supra), which term is defined to exclude open and obvious conditions. Thus, a finding that a machine is not defective because it was in an open and obvious condition and therefore not "unreasonably dangerous," is not really different in end result from a determination that a user assumed the risk by subjecting himself to a patent "defect" or condition.

Plaintiff asserts that the laborer does not assume the risk of his employer's failure to comply with the law (App. Br. 5). Neither common law nor statute fastens any duty upon the manufacturer or seller in this milieu.

Throughout his brief, plaintiff attempts to avoid the plethora of contrary authority by reliance upon inapposite premises and employment cases. In answer to plaintiff's rhetorical question regarding the manufacturer's duty (App. Br. 6), a different standard of care applies because the manufacturer has no control over the instrumentality once it enters the stream of commerce. The premises owner (App. Br. 8) and the employer (see App. Br. *passim*) retain complete control over premises and instrumentalities. They are able to and responsible for producing a safe place to work or walk for the employee or invitee. The sole duty of the manufacturer is to produce a machine which performs a particular act or series of acts as represented. When such a machine is produced and is not in a defective condition, unreasonably dangerous to the consumer, the manufacturer's duty is complete and he is not liable for injuries arising out of obvious conditions perceptible to the ordinary user.

B. Negligence

The manufacturer and seller of equipment is not negligent when he sells a machine with a patent condition perceptible to all comers. So long as the machine is reasonably fit for the purposes contemplated, the manufacturer or seller has no duty to guard against open and obvious "potentialities" of danger. The authorities for this proposition are legion; some of the leading cases follow:

Marker v. Universal Oil Products Co., 250 F2d 603 (10th Cir 1957).

Campo v. Scofield, 301 NY 468, 95 NE2d 802 (1950).

Blankenship v. Morrison Machine Company, 255 Md 241, 257 A2d 430 (1969).

Posey v. Clark Equipment Company, 409 F2d 560 (7th Cir 1969).

Kerber v. American Machine & Foundry Company, 411 F2d 419 (8th Cir 1969).

Hardy v. Hull Corp., 446 F2d 34 (9th Cir 1971).

Fisher v. Johnson Milk Company, 383 Mich 158, 174 NW2d 752 (1970).

Tomicich v. Western-Knapp Engineering Company, 292 F Supp 323 (D Mont 1968), affd 423 F2d 410 (9th Cir 1970).

Stevens v. Durbin-Durco, Inc., 377 SW2d 343 (Mo 1964).

Parker v. Haesler Plumbing & Heating Company, 388 P2d 516 (Wyo 1964).

Bradshaw v. Blystone Equipment Co. of Nevada, 386 P2d 396 (Nev 1963). (Lessor-Lessee).

Tyson v. Long Manufacturing Company, 249 NC 557, 107 SE2d 170 (1959).

Standard Conveyor Company v. Scott, 221 F2d 460 (8th Cir 1955).

Jamieson v. Woodward and Lothrop, 247 F2d 23 (DC Cir 1957).

Brown v. General Motors Corporation, 355 F2d 814 (4th Cir 1966).

Shanklin v. Allis-Chalmers Manufacturing Company, 254 F Supp 223 (SD W Va 1966).

Villaneuva v. Nowlin, 77 NM 174, 420 P2d 764 (1966).

See also Katz v. Arundel-Brooks Concrete Corporation, 151 A2d 731 (Md. App 1959).
See also Cornette v. Sergeant Metal Products, Inc., — Ind App —, 258 NE2d 652 (1970).

The reason for the negligence rule was best expressed by Justice Fuld in the landmark case of *Campo* v. *Scofield*, *supra*, 95 NE2d at 804:

"If a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demands. We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or foolproof. Just as the manufacturer is under no obligation, in order to guard against injury resulting from deterioration, to furnish a machine that will not wear out, * * * so he is under no duty to guard against injury from a patent peril or from a source manifestly dangerous. To illustrate, the manufacturer who makes, properly and free of defects, an axe or a buzz saw or an airplane with an exposed propeller, is not to be held liable if one using the axe or the buzz saw is cut by it, or if someone working around the airplane comes in contact with the propeller. In such cases, the manufacturer has the right to expect that such persons will do everything necessary to avoid such contact, for the very nature of the article gives notice and warning of the consequences to be expected, of the injuries to be suffered. In other words, the manufacturer is under no duty

> to render a machine or other article 'more' safe —as long as the danger to be avoided is obvious and patent to all.
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> * * * * *
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> "* * * in cases dealing with a manufacturer's liability for injuries to remote users, the stress has always been upon the duty of guarding against *hidden* defects and of giving notice of *concealed* dangers. * * *."

If the manufacturer's liability is to be extended, if he is to be impelled to equip his product with all manner of safety devices, this determination should be made legislatively, not judicially. *Ibid* at 805.

In *Stevens* v. *Durbin-Durco, Inc.*, supra, the court held that a manufacturer is not an insurer, and that he is under no duty to make his product accident or fool proof. The manufacturer must use ordinary care in the production of goods, and he is liable to a remote user injured by a latent defect in design or manufacture. 377 SW2d at 346-347. The extent and limits of the user's duty and the manufacturer's liability depend upon the nature and character of the defect and user's knowledge thereof. The manufacturer is not liable where ~~the defect~~ a condition is open, obvious, and apparent, or where the user had actual knowledge of the danger or condition. For example, in *Stevens* v. *Durbin-Durco, Inc.*, supra, plaintiff charged the manufacturer with failure to equip his machine with safety devices, to which the Missouri court replied (citing *Campo* v. *Scofield*, supra), 377 SW2d at 348:

> "Accordingly, where the product is free of

> latent defects and concealed dangers where the perilous nature of the product and the danger of using it is obvious and not concealed; where its normal functioning creates no danger not known to or appreciated by the user; where it is properly manufactured to accomplish the function for which it is designed, the manufacturer has "satisfied the law's demands' and it is under no duty to make it 'more' safe by providing a built in safety device."

We have not yet reached the state of holding that the manufacturer is liable for all injuries connected with the use of his product, *Standard Conveyor Company* v. *Scott*, supra, 221 F2d at 463, yet this is the very liability plaintiff would fasten on defendants.

The law does not require the designer, seller, or manufacturer to warn or protect against every injury which may ensue from the use of a product. Such a duty dould be onerous, intolerable, unreasonable and impossible. Almost every physical object can be inherently or potentially dangerous. A lead pencil can stab a man in a vital point; because of that potentiality, can a lead pencil become an "inherently dangerous" object? If a person accidentally slips and falls on a pencil point in his pocket, the pencil producer is not liable for the ensuing injury. *Jamieson* v. *Woodward and Lothrop*, supra.

On the premises of these authorities, defendants breached no duty. The condition was patent, not latent. It was apparent to plaintiff. It is obvious that a person might fall from a lumberjack if he climbed

up and down the machine where oil and dust accumulated, where the seller had not provided ladders or steps. Indeed, plaintiff was specifically warned about the condition when his employer told him to grease the machine in this way and before he ever worked on the vehicle (Tr. 42-43). Objectively, the danger of falling was just as clear to the user as is the danger that a wheel may crush, an axe will cut, or a heated stove will burn. These defendants should not be converted into insurers. Such a burdensome obligation would impede commerce and thwart ingenuity, because few manufacturers would undertake production when faced with such risks, and this failure would work to the detriment of the consuming public.

Like his strict liability count, plaintiff here rests his argument upon cases expressing the *employer's* duty to provide a safe place to work and decisions concerned with premises liability (Ap. [sic] Br. 6-8) which cases are obviously distinguishable because of defendants' lack of control herein.

It matters little conceptually whether the negligent count is decided semantically on lack of manufacturer's duty or the employer's contributory negligence as a matter of law. The well-reasoned authorities demand a judgment for defendants as a matter of law. Plaintiff's excursion into assumption of the risk (App. Br. 6) adds little to the discussion. The fact the employee has no duty to inspect the product and add safety devices does not mean that the manufacturer or seller possesses a duty to protect users

by safety devices where the condition is patent. See *Fields* v. *Fields*, 213 Or 522, 326 P2d 451 (1958) (App. Br. 8). If plaintiff's employer required Mr. Askew to grease the vehicle in this manner, perhaps he had a duty to add safety devices or to provide a platform for lubrication. Defendants had no duty because they lacked control.

Faced with a plethora of authority denying recovery, plaintiff rests his brief on the slender reed of three cases which are far out of mainstream of opinion (App. Br. 7-8).

In *Pike* v. *Frank G. Hough Company et al*, 85 Cal Rptr 629, 467 P2d 229 (1970), the California court virtually decreed that it would do as it pleased in the field without reference to other authority. The court distinguished the case by mentioning that while the defect might be clear to the operator of the machine (that he could not see a certain distance behind because of a blind spot), this "defect" was not necessarily known and perceptible to a bystander (467 P2d at 234). However, assuming that the defect was "obvious," California decided that the "modern trend" would not preclude liability. Of course, it cited only three law school professors, Harper, James, and Noel, as authority, and ignored the universal rule to the contrary (Resp. Br. 11, 13-14). The decision appears premised upon "enterprise liability," a doctrine expressly rejected by this Court in *Wights* v. *Staff Jennings, Inc.*, 241 Or 301, 309 et seq, 405 P2d 624 (1965).

In addition, the California court seemed to fail to come to grips with the real essence of strict liability. It focused almost exclusively upon whether or not a jury question existed as to whether the blind spot made the machine "unreasonably dangerous," and entirely missed the threshold question of whether or not the condition constituted a "defect." Thus, the decision either *ignored* Restatement 402A, to which this Court and many others subscribe, or it chose to apply only a *part* of the rule.

Plaintiff also relies upon a Washington Court of Appeals case, *Palmer* v. *Massey-Ferguson, Inc.*, 3 Wash App 508, 476 P2d 713 (1970), a decision which the circuit court below distinguished on the grounds that an actual latent defect existed (Tr. 157). This inapposite case is distinguished by its facts, 476 P2d at 714:

> "Plaintiff turned down the engine to idle speed, disengaged a belt-tightening device that acted as a clutch, adjusted the hay pickup mechanism and then reached down to adjust the drawbar. * * * The characteristic shaking associated with movement of the baler mechanism ceased before plaintiff reached under the machine. When he did so reach, the mechanism was suddenly put into unexpected motion. Plaintiff's hand was struck and then smashed into the front plate, causing him injury * * *."

The fact that the Washington Appellate Court was misled by the California decision in *Pike* v. *Frank G. Hough Company et al*, supra, and cited that case as dicta, should not cause the law in Oregon or other jurisdictions to suffer.

Finally, plaintiff relies upon *Higgins* v. *Paul Hardeman, Inc. et al*, — Mo —, 457 SW2d 943 (1970). The decedent there was inexperienced with the truck in question, 457 SW2d at 945, and the sensitive hydraulic lift system probably was dangerously defective under Restatement 402A. The court rested its decision upon the fact that the control rod, while plainly visible, *was not an open and obvious condition necessarily perceptible to a truck driver* (like decedent) with 35 years' experience in the field. 457 SW2d 947. Contrast that to the case at bar where the dangers of scrambling up and down a vehicle to lubrication points is manifest to all who will possess common understanding.

C. Summary

Under both the strict liability in tort and negligence counts, the law is clear that the manufacturer and seller of equipment containing open and obvious conditions is not liable for injuries resulting from the potential dangers inherent in those conditions which are perceptible to the normal user. This case does not present a defective product unreasonably dangerous to the consumer; the product is precisely what the consumer and consumer's employee anticipated. The vehicle is reasonably fit for the purposes intended. A knife will cut, and it may cut a finger as well as a block of wood. To impose a duty for every cut finger upon the manufacturer of a knife would soon disrupt all knife production in the United States, and mankind would be the loser.